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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TAMAR DESHON DOSS,

Defendant and Appellant.

B151118

(Los Angeles County
Super. Ct. No. TA057639)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Tamar Deshon Doss appeals from the judgment entered following a jury trial that resulted in his conviction of carjacking with the use of a firearm, assault with a firearm, and criminal threats. (Pen. Code, §§ 215, subd. (a), 245, subd. (a)(2), 422, 12022.5, subd. (a), 12022.53, subd. (b).)¹ The jury was unable to reach a verdict on a charge of grand theft, which the trial court dismissed in the interest of justice.

At a separate proceeding, the jury found that defendant suffered two prior serious felony convictions. (§§ 667, subd. (a), 667, subds. (b)–(i), 1170.12.) At sentencing, the court granted the prosecutor’s motion to dismiss the criminal threats conviction in the interests of justice (§ 1385) and sentenced defendant to prison for a total term of 67 years to life. We affirm.

BACKGROUND

This case involves two incidents on separate dates during which defendant committed violent acts against unrelated victims.

The first incident occurred at approximately 11:00 p.m. on August 31, 2000. Compton resident Tony Chris left a neighborhood liquor store and walked to his truck. He noticed defendant and a woman walking in his direction. The two split up, with defendant walking toward the rear of Chris’s truck and the woman heading toward the liquor store entrance. When Chris opened his truck door, defendant came up from behind and demanded the keys. He pointed a gun at Chris’s back. Chris threw his keys on the floorboard of his truck and backed away. Defendant said, “Come here or I’ll kill you.” Chris ran inside the liquor store and reported the incident to the Compton police.

Defendant and the woman left in Chris’s truck before the police arrived. Chris gave the police a description of the carjacker and added that the carjacker “looked familiar from around the area.” On September 2, 2000, the police found Chris’s truck on Compton Avenue. The truck was burned and its tires and rims were missing.

¹ All statutory references are to the Penal Code unless otherwise indicated.

At approximately 3:00 p.m. on September 20, 2000, Keandra Doss, defendant's estranged wife, went to a Compton liquor store with her uncle, Alvin Spencer. At the time, Keandra was living with relatives on the same street as defendant's residence. Keandra and defendant have one daughter in common.

Outside of the store, Keandra ran into defendant and they argued. Defendant grabbed the bag that Keandra was carrying. At Spencer's urging, Keandra stopped arguing and left. By the time Spencer had driven Keandra home, she was crying.

Later that afternoon, Keandra was standing outside her residence with several people. Defendant and a woman approached the group. Defendant demanded to know which person in the group had threatened his girlfriend. Someone in the group told defendant to leave. Defendant left but said that he would be back. Five minutes later, defendant returned with a gun. He pointed the gun at Keandra, called her a vulgar name and said, "... I'm going to kill you,'" and left.

Keandra called the sheriff's department several times that day between the hours of 3:00 p.m. and 10:00 p.m. She reported that defendant had stood outside her home and threatened her with what appeared to be a gun, that he drove by her home and threatened to kill her, pointing his finger at her as if it was a gun barrel, and then drove by again while pointing a real gun at her. Keandra further reported that defendant, defendant's mother, and defendant's girlfriend called her house several times and threatened her.

On October 4, 2000, several sheriff's deputies arrested defendant at his residence and conducted a search of the home pursuant to a search warrant. Defendant lived less than a mile from where Chris had been carjacked. During the search of defendant's home, the deputies found Chris's organizer, which had been left in his truck. One of the deputies asked defendant to whom the organizer belonged. Defendant initially said that he did not know. When asked about "Tony," the name written inside the organizer, defendant said that Tony was his "'homeboy, rest in peace.'" In addition, the deputies found two handguns (at least one of which was loaded) that defendant claimed belonged to his girlfriend. And in defendant's bedroom and the backyard, the deputies found 10 custom tires and rims. Thereafter, Chris was contacted by the sheriff's department and

went to the station. There, Chris identified the organizer as belonging to him. He also viewed a photographic lineup and identified defendant as the man who had carjacked him.

In defense, defendant's mother, Reeshena Doss, testified that she had purchased a box of soap powder from a panhandler in September 2000. Several days later, she found Chris's organizer inside the soap box. She gave it to defendant. Reeshena also testified that she, Keandra, and two other women were talking in front of Reesheena's house a few months after defendant's arrest. Keandra was upset and crying. Keandra said that she lied to the sheriff's deputies about defendant because she wanted to get him in trouble.

ISSUES

Defendant contends that the court erred in denying his motion to suppress evidence obtained from a search of his residence, his pretrial motions to sever the counts and to continue the trial, and his request pursuant to Evidence Code section 352 to exclude evidence of the tires and rims found at his residence; precluding his attorney from using a poster board during closing argument; and instructing the jury with CALJIC No. 17.41.1. In a supplemental opening brief, defendant contends that the court abused its discretion in refusing to strike one of his prior "strike" convictions and that his sentence constitutes cruel and unusual punishment.

DISCUSSION

1. Search and seizure

The search warrant issued for the October 4, 2000 search of defendant's residence authorized the search and seizure of handguns allegedly used by defendant against Keandra on September 20, 2000, any firearms or ammunition for which there was no proof of ownership, and miscellaneous items associated with handguns, including gun parts, holsters, "original box packaging, targets, . . . any photographs of firearms, or any paperwork showing the purchase, storage, disposition, or dominion and control over any guns, any ammunition, or any of the above items." As noted, the search uncovered, in addition to two handguns, "[t]en wire rims and tires" and Chris's organizer.

Before trial, defendant moved to suppress evidence of the tires, rims and the organizer on the ground that these items were not described in the search warrant. The evidence at the hearing disclosed that the search warrant was based on Keandra's September 20, 2000 complaints about defendant and the focus of the warrant was for handguns that defendant allegedly used against Keandra. In addition, the deputies had a photograph of defendant.

Defendant, his girlfriend, and his younger sister were present when the deputies served the warrant. Defendant identified himself as David Doss, his deceased brother. During the search, which lasted approximately an hour, defendant's mother arrived.

The deputies searched four bedrooms, including one used by defendant, the living room, dining room, kitchen, yard, and "three or four vehicles" that belonged to defendant. The deputies found two handguns. When asked about the guns, defendant screamed at his girlfriend, "[T]hose are not my . . . gats You better tell them that those are your . . . gats." The deputies also found 10 tires and rims.

Inside defendant's bedroom was a suitcase. The deputies opened the suitcase and found several photographs, none of which depicted any firearms, and a black organizer. Deputy Quilmes Rodriguez opened the organizer and looked inside to see if it contained photographs or paperwork relating to guns. Tony Chris's name was written on the personal profile page of the organizer and the address written there was different from defendant's address. Deputy Rodriguez asked defendant who owned the organizer. Defendant said that he did not know. Deputy Rodriguez then asked defendant who was Tony Chris. Defendant replied, "[M]y homeboy, rest in peace[]."

Defendant argued that the organizer, tires and rims were outside the scope of the search warrant and thus were illegally seized. The court found that the items were discovered in plain view during the course of a lawful search and denied the motion to suppress.

The court properly denied defendant's motion to suppress. "“When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, they may

seize them whether they are initially in plain sight or come into plain sight subsequently, as the result of the officers' efforts." [Citation.]' [Citations.] To justify such a seizure, the officers must lawfully be in the position from which they view the item; the incriminating character of the item as contraband or evidence of a crime must be immediately apparent; and the officers must have a lawful right of access to the object. [Citations.] The Fourth Amendment does not prohibit such seizure of evidence in plain view even if the discovery by the officers was not 'inadvertent.' [Citations.]" (*People v. Gallegos* (2002) 96 Cal.App.4th 612, 622–623.)

Notwithstanding defendant's argument to the contrary, Deputy Rodriguez did not act in flagrant disregard of the terms of the warrant when he opened and searched the organizer. The item was in a suitcase in defendant's bedroom, and it could have contained documents or photographs connecting defendant to firearms or ammunition. (*People v. Gallegos, supra*, 96 Cal.App.4th at pp. 624–626.) The search and seizure of the organizer did not violate defendant's federal and state constitutional rights against unreasonable searches and seizures.

Nor was the seizure of the tires and rims improper. Defendant was in possession of a substantial number of tires with rims that were not mounted on any vehicle. During the course of the search, defendant falsely identified himself to the deputies, vehemently denied that the guns found in his home belonged to him, and ordered his girlfriend to claim possession of the guns. Under these facts, the deputies had probable cause to believe that the tires and rims were stolen property. (*People v. Gallegos, supra*, 96 Cal.App.4th at pp. 623, 627.)

2. Denial of defendant's motion to sever and motion to continue

On the morning of March 9, 2001, before the case was sent to trial, defendant moved to sever the carjacking count and to continue the trial. Keandra had been hospitalized for a medical condition for several weeks. Days before trial was scheduled, Keandra was in a semicoma and was unlikely to testify at trial. Given this, the prosecutor

informed defense counsel that she intended to admit Keandra's statements to the sheriff's deputies as permitted by Evidence Code section 1370.² The prosecutor represented that she had informed defense counsel of the possibility that she would seek admission of the statements when Keandra first entered the hospital.

a. Motion to sever charges

Regarding the motion to sever, defense counsel argued that Keandra's unavailability for trial was detrimental to the defense because "that witness would be valuable to us to explain some of the issues that jump from that case to this case to the carjacking case." Counsel also asserted that joinder of the charges "puts together a very weak with a strong case." The court denied the motion to sever. Defendant contends that the court erred in doing so. We disagree.

"When . . . the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant's severance motion. [Citations.] In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling. [Citation.] The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case." (*People v. Mendoza* (2000) 24 Cal.4th 130, 160–161.)

² In pertinent part, Evidence Code section 1370 provides that a statement made by a declarant is not inadmissible under the hearsay rule if the declarant is unavailable as defined by Evidence Code section 240 and the statement was made to a law enforcement officer, described the threat of physical injury to the declarant, and made at or near the time of the threat under circumstances indicating its trustworthiness.

Here, the charges were properly joined pursuant to section 954 because the crimes defendant committed against Keandra and the crime committed against Chris were of the same class, namely, “‘assaultive crimes against the person[.]’” (*People v. Walker* (1988) 47 Cal.3d 605, 622.)

We point out that although defendant asserted before the trial court that joinder paired a weak case with a strong case, defendant failed to identify which case was “weak” and which case was “strong.” In his opening brief, defendant mentions the incidents involving Keandra when he initially discussed pairing a weak case with a strong one. But later in his opening brief, defendant characterizes the carjacking incident as the “weak” case. Nonetheless, the record establishes that there was strong evidence against defendant on the carjacking charge and the charges involving Keandra. The fact that the jury was unable to reach a verdict on the grand theft charge involving Keandra is immaterial in determining whether the court abused its discretion, since the motion quite obviously was made before the jury’s deadlock on that charge. (*People v. Mendoza, supra*, 24 Cal.4th at p. 161.) In addition, the similarity of the charges, namely assaultive crimes against the person, ensured that neither the carjacking charge nor the charges involving Keandra was significantly more inflammatory than the other. And although there was no cross-admissibility of evidence, “the absence of cross-admissibility does not by itself demonstrate prejudice.” (*Ibid.*)

We further reject defendant’s contention that joinder of the charges violated his right to due process of the law. Defendant argues that the evidence in support of the carjacking conviction was weak, in part because some of the evidence should have been suppressed (organizer, tires and rims) or excluded (tires and rims). This argument fails because such evidence was not in fact suppressed or excluded. Defendant also asserts, without explanation, that “emotionalism” of the charges involving Keandra gave the People “momentum” in proving the carjacking charge. As noted, neither incident was more inflammatory than the other as they both involved defendant’s violent use of a gun against a person. In short, defendant fails to explain how joinder of the charges rendered

his trial fundamentally unfair, resulting in a denial of due process. Accordingly, we reject this argument. (*People v. Mendoza, supra*, 24 Cal.4th at pp. 162–163.)

b. Motion for a continuance of the trial

Regarding defendant’s motion for a continuance of the trial, defense counsel argued that the anticipated absence of Keandra changed her trial strategy. At an ex parte conversation, counsel explained that Keandra had made statements to defendant’s mother recanting her September 20, 2000 allegations that defendant had threatened her. Because of Keandra’s unavailability, counsel could not cross-examine Keandra on the subject and instead would have to address it in a different way. When asked by the court to elaborate, counsel said that she needed time to find additional witnesses to substantiate the alleged recantations by Keandra. The court noted that counsel should have already located these witnesses by that time and denied the motion for a continuance.

Defendant contends that the court erred in denying his motion for a continuance. Again, we disagree. Defense counsel had disclosed in her ex parte communication with the court that she already obtained information showing that Keandra had recanted the allegations. Thus, the trial court did not abuse its discretion by refusing defendant a continuance to permit *further* investigation for evidence that could impeach Keandra’s allegations against defendant. (See *People v. Laursen* (1972) 8 Cal.3d 192, 204.)

3. Evidence of tires and rims

At a hearing out of the presence of the jury, defendant objected to the admission of evidence that sheriff’s deputies found 10 tires and rims in defendant’s home on Evidence Code section 352 grounds. He argued that there was no proof that any of the tires or rims came from Chris’s truck or that the tires or rims were obtained during a carjacking. The prosecutor argued that the evidence was relevant on the issue of motive because Chris’s carjacked truck was found abandoned, burned, and missing its tires and rims. The court overruled defendant’s objection.

Defendant contends that the court erred in admitting evidence of the tires and rims found in defendant’s home. We disagree.

The evidence of the tires and rims found in defendant's home was admissible because it was relevant to show defendant's motive for carjacking Chris. (Evid. Code, §§ 210, 350.) Defendant apparently collected tires and rims and Chris's carjacked truck was found without its tires and rims.

To the extent the jury could construe the evidence of defendant's possession of the items as suggestive of a propensity by defendant to commit carjackings, the evidence still was admissible. (Evid. Code, §§ 1101, subd. (b), 352.) "The trial court has the discretion to admit evidence of crimes committed by a defendant other than the one for which he is charged, if such evidence is relevant to prove some fact at issue, and if the probative value of the evidence outweighs its prejudicial effect. [Citation.] 'When reviewing the admission of evidence of other offenses, a court must consider (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, "[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded." [Citation.]' [Citation.]" (*People v. Hawkins* (1995) 10 Cal.4th 920, 951, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110, and *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

Defendant's motive for committing the carjacking of Chris was relevant and not supported by any other evidence. In addition, the evidence that defendant possessed tires and rims, *at best*, tenuously suggested a propensity to commit carjackings on defendant's part. Further, the evidence was much less inflammatory than the facts of the current carjacking charge. In sum, because the evidence of the tires and rims found in defendant's home was neither confusing nor misleading, and because the evidence was probative on the issues of defendant's motive to commit the carjacking of Chris, the court did not abuse its discretion in admitting the evidence. (Evid. Code, §§ 1101, subd. (b), 352; *People v. Hawkins, supra*, 10 Cal.4th at p. 952.)

4. Closing argument

Before giving her closing argument, defense counsel informed the court that she intended to use a poster board reproducing an excerpt from a United States Department of Justice report on eyewitness evidence.³ The prosecutor objected to defense counsel's use of the poster board because it quoted from a government report. The court ruled that defense counsel could not use the board because there was no evidence presented at trial on the reliability of eyewitness identification. In response to the court's ruling, defense counsel stated, "And at this point I would indicate to the court, counsel, and to my client that there is a serious problem with my incompetency by not calling an eyewitness identification expert."

Defendant contends that the court's ruling precluded counsel "from illustrating [the defense] position with authority that Chris's eyewitness identification was suspect." He asserts that the poster board counsel prepared "relating the pitfalls of eyewitness identification" constituted "demonstrative evidence" that counsel was entitled to use

³ The excerpt read as follows: "Eyewitnesses frequently play a vital role in uncovering the truth about a crime. The evidence they provide can be critical in identifying, charging, and ultimately convicting suspected criminals. That is why it is absolutely essential that eyewitness evidence be accurate and reliable. One way of ensuring we, as investigators, obtain the most accurate and reliable evidence from eyewitnesses is to follow sound protocols in our investigations. [¶] 'Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory. This issue has been at the heart of a growing body of research in the field of eyewitness identification over the past decade. The National Institute of Justice convened a technical working group of law enforcement and legal practitioners, together with these researchers, to explore the development of improved procedures for the collection and preservation of eyewitness evidence within the criminal justice system.' [¶] Excerpt from Message from the Attorney General, page iii [¶] Eyewitness Evidence – A Guide for Law Enforcement [¶] Research Report [¶] U.S. Department of Justice, Office of Justice Programs [¶] National Institute of Justice."

during closing argument to “assist[] . . . the jury[] to understand the problems associated with eyewitness identification, a generally misunderstood phenomenon.”

Defendant cites numerous law review articles and secondary sources that stand for the proposition that demonstrative evidence is admissible at trial when relevant to prove a disputed issue or to clarify or illustrate other evidence. But defendant cites no authority for the proposition that he should have been allowed during closing argument to quote from a government report on a topic that he concedes is not commonly known. In any event, the court permitted defense counsel to argue at length about the unreliability of eyewitness testimony in general. The court even permitted counsel to argue that many individuals who had been convicted based on eyewitness testimony had been exonerated through DNA evidence. The court did not abuse its discretion in precluding defense counsel from using the poster board. (*People v. London* (1988) 206 Cal.App.3d 896, 909.)

Defendant alternately contends that his counsel rendered ineffective assistance because she did not offer expert eyewitness identification evidence at trial. We disagree.

In order to succeed on a claim of ineffective assistance of counsel, defendant must demonstrate that counsel’s representation fell below an objective standard of reasonableness and that he was prejudiced as a result. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1030.) “Prejudice is established when the record demonstrates ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” (*Id.* at p. 1031.) “If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel’s performance was deficient.” (*People v. Mayfield* (1997) 14 Cal.4th 668, 784.)

The record does not disclose the nature and content of the eyewitness identification evidence that defendant contends should have been proffered. Thus, “we are therefore unable to infer anything about its existence, probative force, or the probable consequences at trial, had such evidence been presented.” (*People v. Cunningham*,

supra, 25 Cal.4th at p. 1033.) Accordingly, we reject this claim of ineffective assistance of counsel.

5. CALJIC No. 17.41.1

CALJIC No. 17.41.1, with which defendant's jury was instructed over his objection, provides: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

Defendant argues that the court erred in giving CALJIC No. 17.41.1 to the jury. As recently held by the Supreme Court in *People v. Engelman* (July 18, 2002, S086462) ___ Cal.4th ___ [2002 D.A.R. 8034], the giving of CALJIC No. 17.41.1 is not error.

6. Sentencing issues

Defendant contends that the court abused its discretion in denying his motion to strike one of his prior strike convictions. Alternatively, defendant contends that his sentence "shocks the conscience" and thereby constitutes cruel and unusual punishment. We reject both contentions.

Defendant was born in 1975. His strike prior convictions were for residential burglary and kidnapping stemming from a 1993 incident wherein defendant entered a woman's home, forced her to leave her home and cash a check, and took some of the money. Defendant received a four-year prison sentence. He violated parole in 1997 and was sent back to prison to finish his term. On February 16, 2000, he was discharged from parole. He committed the current crimes in August and September 2000.

At sentencing, defendant requested that one of his strike convictions be dismissed in furtherance of justice, arguing that his prior strike convictions arose from the same transaction. The court denied defendant's motion and sentenced him under the Three Strikes law to a term of 27 years to life for the carjacking of Chris plus a 10-year term for the firearm enhancement, a consecutive term of 25 years to life for the assault with a firearm committed on Keandra Doss, and a 5-year term for suffering a prior serious

felony conviction within the meaning of section 667, subdivision (a). Thus, defendant's sentence is 67 years to life.

In ruling on a motion to strike a prior conviction under the Three Strikes law, the trial court must consider whether, in light of the nature and circumstances of the present offense, the prior felony convictions, and the particulars of the defendant's background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he or she had not previously been convicted of one or more serious or violent felonies. (*People v. Garcia* (1999) 20 Cal.4th 490, 498–499.) The trial court's exercise of discretion is subject to review under the deferential, abuse-of-discretion standard. (*People v. Cole* (2001) 88 Cal.App.4th 850, 873, fn. 9; *People v. Myers* (1999) 69 Cal.App.4th 305, 309–310; but see *People v. Benevides* (1998) 64 Cal.App.4th 728, 734–735.)

Here, the trial court considered defendant's arguments and concluded that an order striking one of defendant's prior convictions would be inappropriate. In light of the nature and circumstances of defendant's present convictions for an assault with a firearm, a serious offense (§ 1192.7, subd. (c)(31)), and carjacking, a serious and violent offense (§§ 1192.7, subd. (c)(27), 667.5, subd. (c)(17)), defendant's record of criminal behavior, and the particulars of his background, character, and prospects, we can find no error in the trial court's determination that defendant could not be deemed outside the spirit of the Three Strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 163.)

We also find no merit in defendant's contention that his 67-years-to-life sentence constitutes cruel and unusual punishment. Under the Three Strikes law, defendants are punished not just for their current offenses, which in this case are grave, but also for their recidivism. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823–825.) Based on the present record, defendant's sentence was neither grossly disproportionate under the Eighth Amendment to the United States Constitution nor does it shock the conscience and offend fundamental notions of human dignity under article I, section 17 of the California Constitution. (*People v. Cooper, supra*, 43 Cal.App.4th at pp. 823–828.) Defendant's cruel and unusual punishment argument must be rejected.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

ORTEGA, J.